The rights of the pledgor, in case of a purchase by the pledgee, are to affirm or disaffirm the sale. It is not void, but voidable. If the pledgor elect to treat the sale as void the pledgee continues to be held under the original agreement, leaving the rights of the parties unaffected. Upon tender of the debt and refusal by the pledgee to return the pledge there is a conversion and the lien is discharged.[12] If the pledgor affirms the sale, he may hold the pledgee liable for the amount bid by him at the sale, and the pledgee cannot recover the full amount of the debt from the pledgor, but will be forced to allow the proceeds of the sale to be set off against his claim.[13] The right to avoid the sale, in case the pledge is afterwards sold to a purchaser for value, is lost if not exercised within a reasonable time,[14] and even though there be no subsequent sale, if the pledgor does not disaffirm the sale by a tender, within a reasonable time after he has knowledge that the pledgee was the purchaser, he is taken to have affirmed it.[15]

The principles governing the decree of the chancellor in the case of Holston National Bank v. Wood are, therefore, sound in reason and in accordance with the previous decisions upon the question.[16]

R. B. W.

PROPERTY—ADVERSE POSSESSION—RAILROAD RIGHT OF WAY.—The D. L. & W. R. R. Co. acquired, by deed of purchase, a strip of land outside of, but adjoining, its right of way. For more than fifty years the company did absolutely nothing to indicate that it had any purpose whatever in acquiring the property. In an action of ejectment, the defendant proved adverse possession of the premises for longer than the statutory period. The plaintiff company contended that the property was purchased with a view of making it part of the right of way, and that, consequently, title to it could not be acquired by adverse user. *Held,* that although no part of the right of way of a railroad company can be acquired by adverse possession, there is no authority for holding that property of a railroad company not included in its right of way, may not be so acquired. Nothing is included in the right of way except that which may lawfully be the subject of condemnation, and when a railroad company asserts a public use in land it has purchased, to overcome

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[12] Hyams v. Bamberger, 10 Utah 1 (1894).

[13] Faulkner v. Hill, 104 Mass. 188 (1870).

[14] Lord v. Hartford, 175 Mass. 320 (1900); Hayward v. Nat. Bank, 96 U. S. 611 (1877).

[15] Hill v. Finigan, 77 Cal. 267 (1888); First Nat. Bank of Kansas City v. Rusk, 85 Fed. 539; McDowell v. Chicago Steel Works, 124 Ill. 491 (1889); Geer v. Lafayette Co. Bank, 128 Mo. 559 (1895).

[16] For a general note on the subject of pledges, see note to the case of Glidden v. Mechanics' Bank, 53 Ohio, 588 (1895), in 43 L. R. A. 737.

the adverse possession by another, its claim can only be sustained by showing the existence of conditions which would have permitted it to condemn land in the first instance, or actual dedication to such use.[1]

The theory of this case is based on the Constitution of Pennsylvania [2] and is, that land which forms the railroad's right of way is impressed with a public use,[3] and is to be considered as a public highway; consequently title to it cannot be acquired by adverse user. Since, in order to acquire land by condemnation proceedings, it is necessary to prove a public use,[4] title to it is said to be unable to be lost by the adverse user of another. But, in regard to land *purchased* by a railroad company, the statute of limitations is applicable unless the owner can prove that it is being devoted to a public use.[5]

The United States Supreme Court has reached the same conclusion by a different line of reasoning. In the case of N. Pac. R. R. v. Townsend,[6] Congress had granted to a railroad company for a right of way, land which a third party subsequently claimed to have acquired by adverse use. White, J., said: "That in effect the grant was of a limited fee, made on an implified condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted. * * * To give such efficiency to the statute as would confer a title on the defendant would be to allow that to be done by indirection which could not be done directly."

Other cases deny the theory and conclusion of the principal case. "A railroad company owes certain duties to the public, but it holds and uses its property for the profit of its stockholders. The cases holding that the statute of limitations affords no defence to actions for encroachment upon streets and roads are inapplicable. A railroad is not a public highway in the sense that it belongs to the people. . . . The state confers the power of eminent domain to enable railway companies to perform efficiently their duties as common carriers. But it is not apparent why the state should be concerned in preventing investors in railway stocks from sustaining loss through the negligence of their agents (directors)." [7] The logic of this case is clear and unanswerable: if a railroad right of way has been held adversely for twenty-one years, not only was there no public use for it, but the interests of

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[1] D. L. & W. R. R. Co. v. Tobyhana Co., 81 Atl. 132 (Pa., 1911).

[2] Art. 17: "All railroads and canals shall be public highways," etc.

[3] Reading Co. v. Seip, 30 Pa., Super. 330 (1906).

[4] P. & L. Dig. of Dec., Vol. 5, Col. 8044.

[5] Lehigh V. R. R. v. Frank, 39 Pa. Super. Ct. 624 (1909). *Accord:* So. Pac. R. R. v. Hyatt, 132 Cal. 240 (1901); Rwy. Co. v. Smith, 170 Mo. 327 (1902); R. R. Co. v. McCaskill, 94 N. C. 746 (1886).

[6] 190 U. S. 267 (1902).

[7] Pgh., etc., Rwy. Co. v. Stickley, 155 Ind. 312 (1900).

the public have not in the least been affected. This reasoning would not apply to streets. When the occasion arises that the land is needed as part of the right of way, it can then be acquired by purchase or condemnation proceedings. The public is not damnified by such a rule. "The possession by a railroad company of its road-bed is the possession by a corporation as its private property to enable it to perform a public duty," [8] and, it is submitted,[9] not differing from the possession of property by any other public service corporation. The courts of Illinois [9] and Mississippi [10] have adopted this view. Other jurisdictions, notably Massachusetts,[11] have seen fit to alter it by statute.

M. G.

[8] Spottiswoode v. R. R. Co., 61 N. J. L. 322 (1898).
[9] Donahue v. R. R. Co., 165 Ill. 640 (1897).
[10] Paxton v. R. R. Co., 76 Miss. 536 (1898).
[11] St. of 1861, c. 100.